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No. 82-1067

IN THE

SUPREME COURT OF THE UNITED STATES

October 1982 Term

JAMES GAMBREL
CONSUMER ASSOCIATION OF KENTUCKY, INC.
CITIZENS FOR DENTURISM IN KENTUCKY, INC.
HAROLD RAY DRUIN
JAMES RENFRO, SR.
JAMES RENFRO, JR.
DAN HAUNER
JAMES GAMBREL
CHESTER HUDSON - - - - - - - Petitioners

versus

THE KENTUCKY BOARD OF DENTISTRY,
JAMES W. HOLLIDAY, D.M.D.
HAROLD BRADFORD, D.M.D.
JAMES M. SMITH, JR., D.M.D.
O. HARLAN WILSON, D.M.D.
HOWARD TITSWORTH, D.M.D.
PAUL WEBB, D.M.D.
JOHN HOYLE
STEVEN L. BESHEAR, As Successor to Robert Stephens, Attorney General, Pursuant to KRS 418.075
LEWIS WHIPPLE, D.M.D.
DOUGLAS KENNEDY, D.M.D.
GORDON KING, D.M.D.
WILLIAM WILLIS, D.M.D.
GLENN M. BARNES, D.M.D.
THE KENTUCKY DENTAL ASSOCIATION - Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court grant a writ of certiorari to review dismissal of Petitioners' antitrust claims where there is no dispute as to the applicable antitrust laws, but only a challenge to the interpretation of the Kentucky dental statutes, and where the court of appeals, the district court, the Kentucky Attorney General, the Kentucky Board of Dentistry, and the Kentucky Dental Association are all in agreement that those statutes clearly prohibit the relief sought by Petitioners?

2. Should the Court grant a writ of certiorari to review dismissal of Petitioners' First Amendment commercial free speech claims when Petitioners admit that Kentucky has legitimate authority to regulate the practice of dentistry, but merely disagree with the means which the State has adopted to protect the health and welfare of its citizens?

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THE KENTUCKY DENTAL ASSOCIATION - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

This action involves interpretation of Kentucky's dental practice statutes. Petitioners maintain that the defendants, the district court, and the court of appeals have all misinterpreted state law, and thus they petition this Court to correct the alleged error.

The amended complaint in this action claims damages to the plaintiffs in the amount of $2,000,000 resulting from alleged violations of the Sherman Antitrust Act, 15 U.S.C. §1 *et seq.*, and from alleged violations of the plaintiffs' right to commercial free speech protected by the First Amendment to the United States Constitution. The plaintiffs have also asked for injunctive and declaratory relief. Respondent Kentucky Dental Association, filed a motion to dismiss which the district court ordered to be treated as a motion for summary judgment. After extensive discovery, the district court sustained the motion for summary judgment and dismissed the complaint and amended complaint with prejudice. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed.

The plaintiffs are a collection of dental laboratory technicians of the self-styled "denturist" movement, and their supporters. The "denturists" are a small group of laboratory technicians who argue that they can provide some of the dental services now provided only by licensed dentists. They advocate that laboratory technicians be allowed to take impressions for dental patients, to fabricate dentures and false teeth, and to adjust and place them directly in the mouths of

patients. *They attempted, unsuccessfully,* to have the Kentucky General Assembly (in its 1978 session) change KRS Chapter 313 to authorize such acts which, concededly, are now illegal as the practice of dentistry without a license. In this action, the "denturists" are launching an initially limited attack on the Kentucky statutory scheme, trying to get patients to come directly to "denturists"—instead of licensed dentists—for dentures. The plaintiffs contend that dentists should be required to give a patient, upon request, a written work authorization which the patient could then take to any dental laboratory technician for fabrication of the denture. Plaintiffs accuse the defendants of interfering with this alleged patient "right."

Petitioners argue that their scheme for delivering dentures to Kentucky patients is consistent with state law. They argue that ". . . the language in [Kentucky Revised Statutes] 313.247 states nothing as to how the prescription gets from the dentist to the dental laboratory." Petition for Certiorari [sic] hereinafter "Petition") at p. 9.

Despite Petitioners' arguments, the district court and the court of appeals held that, *under Kentucky law,* it is illegal for dentists to give work orders *directly to patients.* Rather, both courts held that the Kentucky dental statutes clearly establish the dentist, not the patient, as the consumer of dental laboratory services, and place ultimate responsibility for the quality of dental appliances on the dentist.

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied. Petitioners improperly invoke the jurisdiction of this Court to interpret state law, *i.e.*, the Kentucky dental statutes. The District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit properly held that Kentucky law prohibits dental laboratories from directly serving or advertising their services to dental patients. This same interpretation of the Kentucky statutes has been articulated by the Attorney General of Kentucky in a formal Opinion, Appendix, p. 41, f.n. 4, as well as by the Kentucky Board of Dentistry, which is the state administrative body charged with enforcing these statutes.

Petitioners' antitrust claims are clearly barred because Kentucky's statutory regulation of the practice of dentistry compelled defendants' alleged refusals to send patients directly to dental laboratories. *Parker* v. *Brown*, 317 U. S. 341 (1943). The state action exemption to the federal antitrust laws requires dismissal of petitioners' claims because state policy, clearly articulated in the dental statutes and enforced by the Kentucky Board of Dentistry, prohibits the relief sought by petitioners. Petitioners do not challenge the antitrust law analysis of the court of appeals, but rather limit their petition to an attack on that court's interpretation of state law. Petitioners have not set forth a "special and important reason" justify-

ing review by the Court on the basis of federal antitrust law.

Petitioners' claim that the Kentucky dental statutes unconstitutionally impair their First Amendment right to free commercial speech is a desperate and spurious attempt to improperly invoke this Court's jurisdiction. *Recognizing the weakness of their constitutional arguments, Petitioners abandoned them in the court of appeals.* Appendix, p. 27. Petitioners are simply unhappy that Kentucky law prohibits solicitation of dental work directly on patients by dental laboratories thereby allegedly making patient-directed advertising commercially unrewarding.

The court of appeals properly concluded that "[a]dvertising concerning transactions that are themselves illegal obviously may be suppressed." Appendix, p. 45; *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1970); *Pittsburgh Press Co.* v. *Human Relations Commission,* 413 U. S. 376, 388 (1973). The fact that Kentucky Revised Statutes 313.010(2) prohibits petitioners from advertising direct services to patients is simply a valid determination by the Kentucky legislature of its policy to protect the health of its citizens and the valid exercise of its power to implement that policy by regulating the practice of dentistry. The petition fails to articulate a "special and important reason" for review by the Court based on constitutional grounds, and, therefore, the petition for a writ of certiorari should be denied.

ARGUMENT

I. There Is No Special and Important Reason for This Court to Interpret the Kentucky Dental Statutes, and, Therefore, the Petition for a Writ of Certiorari Should Be Denied.

Rule 17 of this Court specify that a review on petition for writ of certiorari is discretionary, and will be granted ". . . only when there are *special and important* reasons therefor." (Emphasis by counsel.) The Petition fails to articulate a single "special and important reason" for review by this Court. To the contrary, the Petition simply asks this Court to interpret Kentucky state laws regulating the practice of dentistry. Stripped of its verbiage, the Petition asks this Court to adopt a role which is more properly that of the Kentucky courts; *i.e.*, interpreting the Kentucky dental statutes.

Petitioners want this Court to believe that this appeal involves important legal questions arising from the federal antitrust laws. The Petition *obliquely implies* that there may be a conflict between two circuits of the court of appeals on a question of antitrust law, but does not specify or explain that conflict. Petition, p. 15. The Petition attempts to gain credibility by "string-citing" irrelevant antitrust and constitutional law cases without discussion. See, for example, Petition, pp. 9-10. The Petition itself recognizes that the legal questions herein involve interpretation of the Kentucky dental statutes. There is no dispute that if Kentucky statutes prohibit the relief

sought by Petitioners, the alleged acts of defendants are protected by the *Parker* v. *Brown,* 317 U. S. 341 (1943), state action exemption to the federal antitrust laws. The Petition disagrees *only* with the interpretation of the Kentucky statutes by the district court and the court of appeals—not with those courts' application of the antitrust laws, once given that interpretation.

There is *no* conflict between the circuit court's interpretation of the Kentucky dental statutes in this action and *Schiller* v. *Illinois State Dental Society,* No. 78 C 3936 (7th Cir. 1980 *unpublished*), cert. denied, 68 L. Ed. 2d 862 (1981). *Schiller* was simply remanded for discovery; two years of discovery in *this* action, however, have amply established the legitimate bases of Kentucky's dental laws. *Schiller* involved a constitutional attack on Illionis' dental statutes, not their interpretation in light of antitrust law.

In *Schiller,* the district court had granted dismissal solely on the basis of the pleadings. Agreeing with the district court that the Illinois statutes were constitutional if they are rational, the United States Court of Appeals for the Seventh Circuit simply remanded the case for "some evidentiary inquiry" to assure that Illinois has a rational basis to regulate the practice of dentistry. Appendix, p. 62. In contrast, there were more than two years of "evidentiary inquiry" (*i.e.* discovery) in this action before the district court granted summary judgment. As discussed below in response to Petitioners' free speech arguments, the

record here *more than* adequately reflects a rational basis for limiting the state control over the fitting of dental appliances to licensed dentists.

There can be—and is—no conflict between circuits, because *Schiller, supra,* is an unpublished, unreported decision, *as Petitioners themselves note.* Petition, p. 15. As such, it has no precedential value. *Hupman* v. *Cook,* 640 F. 2d 497, 501 f.n. 7 (8th Cir. 1981); *U. S.* v. *Allard,* 600 F. 2d 1301, 1306 f.n. 5, appeal after remand 634 F. 2d 1182 (9th Cir. 1979).

Obviously, Petitioners cannot rely upon *Schiller* to create a conflict between circuit courts as contemplated by Supreme Court Rule 17.1(a). Petitioners fail to articulate any "special and important reason" for this Court to grant the Petition based on the federal antitrust laws.

II. Kentucky Has Clearly Articulated by Statute Its State Policy Prohibiting Direct Solicitation of Patients by Dental Laboratories and Is Actively Supervising and Enforcing That Policy by Prosecuting and Enjoining Violators.

Petitioners failed to argue or to present any evidence either in the district court or the court of appeals to the effect that the State was not actively enforcing the dental laws. As the court of appeals pointed out, *Petitioners' Amended Complaint itself alleges that the State* and other defendants have harrassed and prosecuted them *by vigorously enforcing the dental laws!!* Appendix, p. 33; Amended Complaint, paragraphs 21, 22. The court of appeals cor-

rectly concluded that there was ". . . *no dispute that the State of Kentucky actively supervises the statutory policy,* thus meeting the second requirement of [*California Retail Liquor Dealers Ass'n* v.] *Midcal Aluminum*[*, Inc.,* 445 U. S. 97 (1980)]." Appendix, p. 42 (emphasis added).

Both the district court opinion and the court of appeals opinion refer to evidence in the record of active State enforcement. Commenting on the Petitioners' characterization of active enforcement of the law by public officials and private citizens as "boycotts," "conspiracy," and general harrassment, the district court pointed out that:

> . . . *the Kentucky legislature depends on public officials and on dentists acting as private citizens to aid in the enforcement of* [*the dental laws*]. *Therefore, plaintiffs' claims are ultimately directed at the State of Kentucky, and any relief they seek must be given them by the Legislature of Kentucky.*

Appendix, p. 54 (emphasis added). The court of appeals noted that by incorporating that policy in statutes with penal sanctions, Kentucky necessarily created a mechanism of active supervision and enforcement. The court of appeals went further, and referred to specific evidence of active supervision in the record:

> Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme.

> In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of this action.

Appendix, p. 43. Because there is ample evidence in the record of active State supervision there is no genuine, important federal antitrust legal question which warrants the granting of a writ of certiorari.

III. The Court of Appeals and the District Court Correctly Construed the Kentucky Dental Statutes as Clearly Prohibiting the Relief Sought by Petitioners.

Petitioners' first "reason for granting the writ" is an expression of dissatisfaction with "the current denture delivery system in Kentucky." Petition, p. 7. In reality, this dissatisfaction is not a special reason justifying review — it is simply Petitioners' disagreement with the interpretation of Kentucky statutes adopted (1) by the Attorney General of Kentucky, (2) the Kentucky Board of Dentistry (the state body charged with responsibility for enforcing the statutes), the United States District Court for the Western District of Kentucky, (4) the United States Court of Appeals for the Sixth Circuit, and (5) the Kentucky Dental Association.

Close examination of Petitioners' arguments reveals that they are merely asking this Court for a new — and obviously incorrect — statutory construction. Petitioners *admit* that under Kentucky law, dentures are included in the practice of dentistry and can only be provided to patients by licensed dentists. Petition,

p. 7. Nevertheless, they argue that Kentucky law ". . . states nothing as to how the prescription gets from the dentist to the dental laboratory." In other words, Petitioners would have the Court believe that dentures have a generic nature like pharmaceuticals, not varying from patient to patient, and requiring little or no reservation of control by dentists once they have written the "prescription." After two years of discovery, the district court correctly noted that Petitioners' claims all stem from their fervent belief that a dental patient should be able to demand a dental appliance "prescription" from his or her dentist and then comparison-shop in the marketplace for a dental laboratory to fabricate the appliance. Appendix, p. 51. Thus, the district court succinctly summarized Petitioners' factual complaints: Petitioners allege ". . . that it is the practice of some dentists [in Kentucky] to refuse to give their customers the right to select their own dental laboratory . . ." Appendix, p. 51.

Quite aside from the fact that after two years of discovery Petitioners had no evidence to support their antitrust claims on the merits, the district court entered summary judgment because it held as a matter of law that Kentucky statutes prohibit dentists from turning over dental appliance work orders (so-called "prescriptions") directly to patients:

> Here, the consumers select their own dentist in the first instance; then that dentist proceeds to order dentures from a dental technician in whom he has trust. *The statute contemplates that he shall have the absolute right and, in fact, the duty to select*

> *whatever dental technician he believes to be qualified to fill the prescription for dentures.* The state statutes, KRS 313.010 and 313.247(1), in effect, constitute the dentist as the consumer of the dental appliances furnished by the dental technician.

Appendix, p. 55 (emphasis added).

The court of appeals likewise held that the Kentucky dental statutes prohibit the relief sought by Petitioners:

> Indeed, we believe the Board of Dentistry's interpretation of the statute is clearly correct. Accordingly, we hold that the dentists' challenged conduct is compelled by the statute itself and therefore exempt under the antitrust laws.
>
> The language of the statute strongly implies that the dentist and dental technician are to deal directly with each other, without any patient involvement . . . We believe this [statutory] language clearly articulates a state policy that dental technicians have contact with and sell to the dentist only and not to the public at large, and that it is the dentist's responsibility to deliver his work orders to the dental technician he chooses.

Appendix, pp. 40-41.

The actual Kentucky statutes interpreted by the court of appeals and the district court are set forth in the Appendix to this Response and are discussed in detail in the Opinion of the court of appeals. Appendix, pp. 25-49. Since Respondents fully agree with

that court's succinct analysis of those statutes, it is not repeated again here.

IV. The Kentucky Statutes Prohibiting Dental Laboratories From Fitting Dentures Do Not Violate Petitioners' Constitutional Rights to Free Commercial Speech.

Petitioners argue that even if there is no antitrust violation because of the state action exemption, the dental statutes themselves are an unconstitutional infringement on their First Amendment right to "commercial free speech." Petition, p. 22. Although their argument is at best obtuse, Petitioners apparently contend that because dental laboratories are (or could be) subject to State supervision and regulation, the State could safely let them treat patients even though they are not licensed dentists. Petition, p. 23. The court of appeals and the district court both recognized that this argument is properly addressed to the State legislature, not the federal courts. Thus, those courts both held that Petitioners utterly failed to present any credible constitutional claim.

Petitioners' constitutional argument is simply a disagreement with the *means chosen by the State* to regulate the practice of dentistry. Although Petitioners acknowledge the *authority* of the State to exercise its police power to protect public health, they argue that prohibiting direct contact between patients and dental laboratories is unnecessary; *i.e.*, that a "less restrictive" solution is possible. Petition, pp. 7, 23. The district court correctly ruled that Petitioners' legal

argument is patently incorrect. A State exercising its police power need not select the least restrictive or even the best means to protect its citizens. It is ". . . sufficient that there was an 'evil' at hand for correction, and that the particular legislative measure was a rational way to correct it." Appendix, p. 52 citing *Williamson* v. *Lee Optical Company,* 348 U. S. 483 (1955).

The district court found ample evidence in the record to establish that the Kentucky legislature had identified a legitimate "evil" and proceeded to correct it in a rational way through the dental statutes:

> By the same token, it is apparent that Kentucky law rationally requires a dentist to be responsible, not only for the treatment of his patient, but also for the fitting of appliances to that patient's mouth and for the proper construction of dentures. Having rationally determined that this responsibility lies with the dentist, it was also rational for the legislature to mandate that no repair or fitting of dental structures be completed except upon the prescription of the dentist, and constructed upon or by the use of casts or molds made by the impression taken by a licensed dentist.

Appendix, pp. 52-53.

After oral argument, the court of appeals concluded that Petitioners had in effect abandoned any constitutional arguments because they acknowledged that Kentucky can constitutionally regulate the practice of dentistry under its police power. Appendix, p. 27.

The court of appeals thus held that there could be no valid First Amendment attack on the Kentucky dental statutes because there is obviously no constitutional right to advertise illegal services:

> We conclude that *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) is entirely dispositive of any suggestion in plaintiffs' brief that the alleged but indirect frustration of their right to free speech is somehow violative of the First Amendment. Plaintiffs do not claim that there has been an express campaign to infringe upon any First Amendment right to commercial free speech. The entire thrust of their argument is that the ban of the consumer's right to chose his own laboratory itself violates the First Amendment right because it thereby makes the plaintiffs' advertising commercially unrewarding. Brief of Appellants at 7. *Because the statutory scheme is a valid exercise of Kentucky's police power, a finding of the district court not challenged in this appeal, there is no infringement of the right of commercial free speech under the First Amendment:*
>
> > As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 771. Advertising concerning transactions that are themselves illegal obviously may be suppressed. See *Pittsburgh Press* v. *Human Relations Comm'n.*, 413 U. S. 376, 388 (1973).

Bates v. *State Bar of Arizona, supra,* 433 U. S. at 384. Appendix, pp. 44-45 (emphasis added).

There is also a substantial amount of evidence in the record which clearly establishes that the Kentucky dental statutes are a reasonable, rational attempt to protect and improve the health of Kentucky's citizens. The record contains expert testimony to the effect that the quality of dental health care services would be substantially reduced if the plaintiffs were successful in establishing a patient right to demand work authorizations to be taken directly to the dental laboratory technician by the patient. Specifically, this evidence tends to show that the fitting of dentures is a complex process, and that the patient may well not return to the dentist for the numerous re-fittings and examinations necessary for good dental practice:

> You've got at least four visits; you've got your impression; you got your bite and shade; you've got your try-in and finish, and so it's at least four visits.

Deposition of Dr. William E. Willis at p. 8. R. 27.

> Q. 79. How many times do you send work to laboratories for the one patient; how many times does it go there? You take an impression; then you send it to the laboratory, right, after you might do some preliminary work?
>
> A. Take the impression and pour models, design the case, then send it back to the laboratory, and they set it up in wax and send it back for me to try . . . [to] check the occlusion, con-

centric relation . . . [and] appearance. Then if it's suitable then I send it back, and they process it.

Q. 80. So generally it's two times?

A. Sometimes more. I've sent some as high as five or six times until I get it right.

Deposition of Dr. Howard Douglas Kennedy at p. 15 and p. 16. R. 29.

Q. 79. Now, say Mr. Druin came in and said he just wanted a tooth replaced on a denture; would that be something that you would have to see after the work was completed?

A. Yes.

Q. 80. For what reason?

A. To check the fit of the appliance after it had been repaired and to be sure that the bite or occlusion was correct and the shade was correct, these sort of things.

Q. 81. Do you think there would be a serious—or any harm to him if you didn't see him?

A. Yes. I have repaired many partials and full dentures that if I hadn't seen the patient they absolutely would not have fit, and that would not have been a healthy situation at all for the patient.

Deposition of Dr. Glenn Mayes Barnes at p. 18 and p. 19. R. 28.

Q. 43. What procedure do you follow now with your dentures? Is it the same that is goes

to the laboratory twice or does it go only to the laboratory once?

A. I take my impression, normally we make the bite rims, sometimes I allow the — I have the bite rims made at the laboratory but we normally make it in the office. Then I select the teeth, give them to the technician, and he sets the teeth up and brings them back to me for a trying and I try the teeth in, send them back to the laboratory to be processed. And he brings them back to me, so that's three, (3), isn't it?

Deposition of Dr. Porter Richmond at p. 15 and p. 16. R. 49.

Q. 263. Okay. If the dentist uses a dental lab what does he do himself?

A. He takes the impression, establishes a bite, and once he establishes the bite he gets his teeth back after they's been set up; he takes them back to the mouth and checks the protrusion and the set-up and sees what — space between the teeth may be too wide, too close. Then he sends them back to the laboratory to be cured.

Q. 264. So how many times do they go to the laboratory?

* * *

A. Three or four times.

Deposition of Dr. A. B. Coxwell (now deceased), at p. 43. R. 13.

Q. 224. Why is it your choice and not the patient's choice?

> A. I consider it to be my choice because I want — in consideration for the welfare of the patients who have presented themselves to me for my treatment of them, I want to use a dental laboratory that I best feel is an extension of my abilities to provide the services for them, should I have to use a dental laboratory . . .

Deposition of Dr. Gordon W. King at p. 38. R. 26.

The Petition fails to raise a substantial constitutional issue. The court of appeals held that no constitutional challenge was properly preserved on appeal. In any event, the Petition does not complain of the authority of the state to regulate the practice of dentistry, but simply disagrees with the *means* chosen by the state legislature. The record fully establishes that Kentucky's regulation of dentistry is adequately based in genuine, rational concerns for the health of dental patients. The Petition does not and cannot dispute that fact. Therefore, the Petition fails to raise any constitutional issue justfying review by the Court, and it should be denied.

CONCLUSION

The Petition for a Writ of Certiorari fails to articulate a single special and important reason for the Court to hear this case. Although the Petition represents that there are important questions of federal antitrust and constitutional law involved, Petitioners do not in fact challenge the circuit court's antitrust analysis. Their only real complaint concerns interpretation of state law, *i.e.*, the Kentucky dental statutes.

The court of appeals held that Petitioners had abandoned their constitutional challenge to the Kentucky dental statutes, and in any event it is clear that Petitioners raise no serious constitutional arguments here. Petitioners admit the authority of the state to regulate the practice of dentistry, but complain about the means chosen because they prefer regulations more financially advantageous to them.

Respondents believe that the Petition fails to warrant review by the Court, and so Respondents request the Court to deny th. Petition for a Writ of Certiorari.

Respectfully submitted,

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RELEVANT PORTIONS OF THE KENTUCKY REVISED STATUTES, CHAPTER 313

313.010 Definitions

As used in this chapter, unless the context requires otherwise:

(1) "Board" means the Kentucky board of dentistry.

(2) Any person shall be regarded as "practicing dentistry" who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind, or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpositions thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and adjacent associated structures, or who takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, or who shall advertise, offer, sell or deliver any such substitute or the services rendered in the construction, reproduction, supply or repair thereof to any person other than a licensed dentist, or who places or adjusts such substitute in the oral cavity of another, or who uses the words "dentist," "dental surgeon," the letters "D.D.S.," "D.M.D.," or other letters or title in connection with his name, which in any way represents him as being engaged in the practice of dentistry.

* * *

(4) "Dental laboratory" includes any person, firm or corporation other than a licensed dentist, who directly or through an agent or employee, by any means or method, in any way supplies or manufactures artificial substitutes for the natural teeth, other than those unfinished substitutes normally available through dental supply houses, or who furnishes, supplies, constructs or reproduces or repairs any prosthetic denture, bridge or appliance to be worn in the human mouth or who performs or offers or undertakes to perform or accomplish dental laboratory technology.

(5) "Dental laboratory technician" means any individual who performs or offers or undertakes to perform or accomplish dental laboratory technology and who is classified as such by regulations of the board adopted as provided in this chapter.

313.247 Laboratory procedure work order required for dental laboratory work, exception

(1) No dentist shall use the services of any person not licensed to practice dentistry in this state to construct, alter, repair or duplicate any denture, plate, bridge, splint, orthodontic or prosthetic appliance, without first furnishing such unlicensed person a written laboratory procedure work order on forms prescribed by the board. Such unlicensed person shall retain the original laboratory procedure work order, and the dentist shall retain a duplicate copy, for two (2) years from the date thereof. All such laboratory procedure work orders required by this subsection shall be open for inspection by the board.

(2) If the person receiving a laboratory procedure work order from a licensed dentist engages another person to perform any of the services relative to such laboratory procedure work order, such other person shall furnish a written work order with respect thereto on forms pre-

scribed by the board. Such person shall retain the original work order, and the person issuing such work order shall retain a duplicate copy for two (2) years from the date thereof. All such work orders required by this subsection shall be open for inspection by the board.

(3) Nothing in this section or KRS 313.020 shall prevent a licensed dentist having a technician working exclusively for him from doing laboratory work under his direction within the confines of his office without a laboratory procedure work order.

313.990 Penalties

(1) Any person who practices or attempts to practice dentistry without a license in violation of KRS 313.020 shall be fined one thousand dollars ($1,000) or imprisoned in the county jail for not more than thirty (30) days, or both, for the first offense; and for each subsequent offense shall be fined two thousand dollars ($2,000) or imprisoned in the county jail for not more than sixty (60) days, or both. Each day that a person without a license, practices or attempts to practice dentistry shall constitute a separate offense.

(2) Any person who violates subsection (2) of KRS 313.040 shall be confined in the penitentiary not less than one (1) nor more than five (5) years.

(3) Any person who violates KRS 313.230 shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for the first offense; and for each subsequent offense shall be fined not less than one hundred dollars ($100) nor more than two hundred and fifty dollars ($250) or imprisoned in the county jail for not less than thirty (30) nor more than sixty (60) days, or both.

(4) Any person who violates KRS 313.240 shall be fined not more than one thousand dollars ($1,000). For a

second or subsequent offense the license of any person who has violated such section may be suspended or revoked as provided in KRS 313.150.

(5) Any person who violates any provision of KRS 313.030 to 313.250 for which no specific penalty has been provided shall be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for the first offense; and for each subsequent offense shall be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or imprisoned in the county jail for not more than six (6) months, or both. Each day that a person illegally holds himself out as practicing dentistry shall constitute a separate offense.

(6) Any person who violates any provision of KRS 313.260 to 313.350 shall be fined not more than fifty dollars ($50.00) or imprisoned in the county jail for not more than thirty (30) days, or both.

(7) Any dentist who violates the provisions of KRS 313.410 shall, upon conviction thereof, be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500), or imprisoned for not less than thirty (30) days nor more than sixty (60) days or both.

(8) Any person who knowingly sells dental supplies and equipment to a person who has been convicted under subsection (1) of this section shall be fined not more than one thousand dollars ($1,000) or imprisoned in the county jail for not more than thirty (30) days or both, for the first offense; and for each subsequent offense shall be fined two thousand dollars ($2,000) or imprisoned in the county jail for not more than sixty (60) days, or both.

No. 80-3336

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES GAMBREL, CONSUMER ASSOCIATION OF KENTUCKY, INC., CITIZENS FOR DENTURISM IN KENTUCKY, INC., HAROLD RAY DRUIN, JAMES RENFRO, SR., JAMES RENFRO, JR., DAN HAUNER, JAMES GAMBREL, CHESTER HUDSON,

Plaintiffs-Appellants,

v.

THE KENTUCKY BOARD OF DENTISTRY, JAMES W. HOLLIDAY, D.M.D., HAROLD BRADFORM, D.M.D., JAMES M. SMITH, JR., D.M.D., O. HARLAN WILSON, D.M.D., HOWARD TITSWORTH, D.M.D., PAUL WEBB, D.M.D., JOHN HOYLE, STEVEN L. BESHEAR AS SUCCESSOR TO ROBERT STEPHENS, ATTORNEY GENERAL PURSUANT TO KRS 418.075, LEWIS WHIPPLE, D.M.D., DOUGLAS KENNEDY, D.M.D., GORDON KING, D.M.D., WILLIAM WILLIS, D.M.D., GLENN M. BARNES, D.M.D., THE KENTUCKY DENTAL ASSOCIATION,

Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Kentucky at Louisville.

OPINION—Decided and Filed September 24, 1982

Before: LIVELY and ENGEL, Circuit Judges, and FEIKENS, District Judge.*

ENGEL, Circuit Judge, delivered the opinion of the Court, in which LIVELY, Circuit Judge, joined. FEIKENS, District Judge, (pp. 20-23) filed a separate dissenting opinion.

ENGEL, Circuit Judge. This appeal requires us to decide whether certain private conduct by several Kentucky dentists, and the enforcement activities of the Kentucky Board of Dentistry, challenged by the plaintiffs as violative of federal antitrust laws, are compelled by Kentucky's statutory scheme of regulation of the practice of dentistry, and therefore exempt from the antitrust laws under the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943) and its progeny.

I

On May 16, 1978, a complaint was filed by James Gambrel, a dental technician, by two consumer groups, and by one consumer of dentures against the Kentucky Board of Dentistry, the Attorney General of Kentucky, and five private dentists. An amendment to the complaint added as plaintiffs five other dental technicians, and as defendants the Kentucky Dental Association, the United States Justice Department, the United States District Attorney, and two members of the Federal Trade Commission. As amended, the complaint alleged that the Kentucky Board of Dentistry violated Gambrel's First Amendment rights by effectively prohibiting his commercial speech and right to advertise, and challenged the constitutionality of Ky. Rev. Stat. § 313.247, which governs the practice of dentistry in Kentucky. The complaint also alleged that the

*Hon. John Feikens, Chief Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Board of Dentistry, the Kentucky Dental Association, and the individual defendant dentists all conspired to monopolize the denture market in Kentucky, restrain trade, and boycott the plaintiff dental technicians, all in violation of sections 1 and 2 of the Sherman Antitrust Act. 15 U.S.C. §§ 1, 2.

In a memorandum opinion filed April 7, 1980, Chief United States District Judge Charles M. Allen concluded that the amended complaint failed to state a cause of action under the antitrust laws because the private actions complained of are commanded by state law and, hence, within the antitrust exemption of *Parker* v. *Brown,* 317 U. S. 341 (1943) and subsequent case law. Judge Allen further concluded that the Kentucky statute regulating the practice of dentistry plainly is a valid exercise of the police power of the state to protect the health and welfare of its citizens and does not violate any constitutional rights of the plaintiffs under the Fourteenth Amendment. Judge Allen further held that the specific statutory restriction on the rights of the plaintiff dental technicians to advertise to the general public, contained in Ky. Rev. Stat. §§ 313.010(2) and 313.020, does not violate the First Amendment rights of the plaintiffs because Ky. Rev. Stat. § 313.010(2) validly permits the plaintiffs to sell their denture products and services only to licensed dentists, and not to the general public.

Although there is a suggestion in plaintiffs' brief of some dissatisfaction with the trial court's findings with respect to the alleged First Amendment violation, the plaintiffs' appeal abandons the constitutional attack upon the Kentucky statute and confines itself to the antitrust claims. Plaintiffs' primary antitrust claim has been that the defendant dentists, relying upon the Kentucky statute, have refused to give denture prescriptions and dental laboratory work orders directly to patients so that they

may thereafter seek the dental laboratory of their choice; instead, the dentists insist on sending denture orders directly to the laboratory of their choosing.[1]

On appeal, plaintiffs insist that this private conduct is not shielded by the antitrust immunity judicially created under *Parker* v. *Brown, supra.* We reject this and other arguments of the plaintiffs and affirm the judgment of the district court.

II

Our *Parker* v. *Brown* analysis requires that we first describe the Kentucky statutory scheme in some detail, as well as the role of the dental technician in that scheme.

Chapter 313 of the Kentucky Revised Statutes defines and regulates the practice of dentistry in Kentucky. It provides that "[n]o person, except those licensed and registered under prior laws of this state, shall practice or attempt to practice dentistry unless he has been licensed by the board [of Dentistry] and has registered his license as provided in K.R.S. 313.110." Ky. Rev. Stat. § 313.020. The act of practicing dentistry is broadly defined, and includes the construction, sale, and advertising of dentures by any person to anyone other than a licensed dentist. Section 313.010(2) provides:

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[1]The plaintiffs' appeal brief begins as follows:

"The Appellant's case is, as simply stated:

A. Can the appellees [defendants] continue to prohibit patients from being given the denture prescription/work order so that the patient can select the denture laboratory of their choice to fill the prescription?

B. Are the Appellants [plaintiffs] entitled to damages for the detriment to them under the current interpretation of the statute by the Appellees?"

Brief of Appellant at 6.

> Any person shall be regarded as "practicing dentistry" who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind, or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpositions thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and adjacent associated structures, or who takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, *or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, or who shall advertise, offer, sell or deliver any such substitute* or the services rendered in the construction, reproduction, supply or repair thereof *to any person other than a licensed dentist,* or who places or adjusts such substitute in the oral cavity of another, or who uses the words "dentist," "dental surgeon," the letters "D.D.S.," "D.M.D.," or other letters or title in connection with his name, which in any way represents him as being engaged in the practice of dentistry.

(emphasis added).

The determination of the qualifications for licensing of dentists and others made subject to the statute's regulation of the practice of dentistry is vested by Chapter 313 in a Board of Dentistry consisting of seven members appointed by the Governor, six from a list of names recommended by the resident licensed dentists of Kentucky at an annual

election supervised by the Board, and the seventh a citizen at large not associated with or financially interested in the practice of dentistry. The term of office and method of filling the vacancies and the remuneration for Board members are carefully set forth by statute. *See* Ky. Rev. Stat. § 313.200. Sections 313.210 and .220 set forth the powers and duties of the Board of Dentistry. Thus, under section 313.220(1):

> The board shall administer this chapter. It may make regulations for its own conduct and procedure, and provide for affiliation with the American Association of Dental Examiners. It may select the subjects and the standard of proficiency and percentage for examinations to practice dentistry, and it shall conduct the examination of all applicants for a license under provisions of this chapter.

Section 313.220(4) provides:

> The board may, subject to the provisions of this chapter, regulate the practice of dentistry and the use of dental auxiliary personnel in this state.

Section 313.220(5) gives the Board broad investigatory powers:

> The board may employ such assistants, inspectors, investigators, clerks, and other persons as it deems necessary to enforce this chapter. It may authorize any of such employees to make investigations and report to the board with respect to any violation of any of the provisions of this chapter or any regulation or order of the board, to inspect any dental office or place where dental operations are performed and to deliver or transmit to any holder of a license under this chapter any order of the board with respect to the licensee's

> performance of his work under the authority of such license. If any holder of a license under this chapter fails or refuses to admit any such representative of the board for the purpose of making any such examination or inspection or if any holder of any such license fails or refuses to comply with any order or direction of the board, such failure or refusal shall be reported to the board for whatever disciplinary action it deems appropriate, including revocation of any license if such failure or refusal is deemed by the board to be material.

Section 313.360 specifically authorizes the Kentucky Board of Dentistry to maintain actions in equity to enjoin the practice of dentistry without a license, providing for a summary trial and punishment of offenders. Section 313.990 provides extensive criminal penalties for violation of the Act. Section 313.990(1) provides that violaters shall receive a fine of $1,000.00 or imprisonment of not more than 30 days for the first offense and for each subsequent offense a fine of $2,000.00 or imprisonment for not more than 60 days, or both. Each day that the violater is without a license and practices or attempts to practice dentistry is to constitute a separate offense. Other stringent restrictions and penalties are imposed for violation of the Act.

Finally, the statute governs and limits the use and operation of a dental laboratory. Under section 313.010(4), "dental laboratory" includes:

> any person, firm or corporation other than a licensed dentist, who directly or through an agent or employe, by any means or method, in any way supplies or manufactures artificial substitutes for the natural teeth, other than those unfinished substitutes normally available through dental supply houses, or who furnishes, supplies, constructs or reproduces or repairs any pros-

thetic denture, bridge or appliance to be worn in the human mouth or who performs or offers or undertakes to perform or accomplish dental laboratory technology.

Section 313.010(5) defines "dental laboratory technician" to mean: "any individual who performs or offers or undertakes to perform or accomplish dental laboratory technology and who is classified as such by regulations of the board adopted as provided by this chapter." It is the regulation of dental laboratories and dental laboratory technicians and the limitations placed upon them by the statutory scheme which is the particular focus of plaintiffs' antitrust litigation in this appeal.

III

(A)

The plaintiffs' case centers on Ky. Rev. Stat. sections 313.247(1) and 313.010(2). Section 313.247 provides in relevant part:

> (1) *No dentist shall use the services of any person* not licensed to practice dentistry in this state to construct, alter, repair or duplicate any denture, plate, bridge, splint, orthodontic or prosthetic appliance, *without first furnishing such unlicensed person a written laboratory procedure work order* on forms prescribed by the board. Such unlicensed person shall retain the original laboratory procedure work order, and the dentist shall retain a duplicate copy, for two (2) years from the date thereof. All such laboratory procedure work orders required by this subsection shall be open for inspection by the board.

(emphasis added). Section 313.010(2), quoted in full above, prohibits dental laboratories from advertising, offering, or selling their services to anyone other than a licensed dentist.

At the heart of the plaintiffs' antitrust complaint is the construction of the foregoing statutes by the Board of Dentistry as forbidding dentists from providing prescriptions for dentures directly to consumers for delivery to the laboratory of their choice as contrasted to the dentist's choice. Plaintiffs alleged that this construction of the statute by the Board has guided its enforcement activities against the plaintiffs as well as most of the private actions of the defendant dentists complained of under the Sherman Act. *See* Complaint as ¶¶ 4, 6, 24. The defendants rely on this construction of the statute to claim antitrust exemption under *Parker* v. *Brown, supra,* a construction disputed by the plaintiffs. We turn now to the exemption issue.

(B)

In *Parker* v. *Brown, supra,* the Supreme Court dealt with a statutory and regulatory scheme in which agricultural cooperatives were organized directly by the State of California for the purpose of restricting competition among the growers of agricultural commodities produced in that state, in order to maintain prices in the distribution of those commodities to packers. Specifically involved in *Parker* v. *Brown* was a seasonal pro-ration marketing program for raisins, a program which prevented the plaintiffs there from freely marketing their 1940 crop. The marketing restrictions, it was asserted, were in restraint of trade contrary to the provisions of the Sherman Act. In upholding the California statutory plan, the Supreme Court assumed that the program would violate the Sherman Act if organized and made effective solely by virtue of a contract,

combination or conspiracy of private persons. However, the Court found that the program derived its authority and efficacy from the legislative command of the state, and that the antitrust laws were not intended by Congress to interfere with the sovereign powers of the states:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U. S. at 350-51.

The Supreme Court has since confirmed the continuing force of *Parker* v. *Brown* in a number of circumstances, most recently in *Community Communications Co.* v. *City of Boulder*, 50 U.S.L.W. 4144 (Jan. 13, 1982). *See also New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109-11 (1978); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978). In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court held that schedules for minimum fees established by a county bar association and enforced by the Virginia State Bar Association were not exempt from antitrust scrutiny because the schedules were not required by the State of Virginia itself. It is not enough, held the Court, that private anti-competitive conduct is "'prompted' by the state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791.

The following year the Supreme Court decided *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976). Of the cases we have examined, *Cantor* can fairly be said to be the most unanticipated in the light of preexisting authority in this area. In *Cantor*, the defendant electric utility company had historically distributed light bulbs to its residental customers without additional charge and had included the cost of the bulbs in its utility rates, rates which were fully regulated by the state. The plaintiff, in *Cantor*, a retailer, brought suit claiming that the utility was using its monopoly power over the distribution of electricity for the purpseof restraining competition in the sale of bulbs. Our circuit affirmed a decision of Judge Feikens reported at 392 F. Supp. 1110 (E.D. Mich. 1974) holding, in reliance upon *Parker* v. *Brown*, that the promulgation of the rate came within the antitrust exemption where it appeared that after conducting its own investigation and hearing, the Michigan Public Service Commission had specifically approved the tariff and by its action made it mandatory for residential subscribers. 513 F. 2d 630 (6th Cir. 1975). The Supreme Court disagreed. In an opinion by Justice Stevens, the Court emphasized that the State of Michigan itself was neutral on the question whether a utility should or should not have a light bulb distribution program and, hence, that the approval of the privately promulgated tariffs which included such a plant did not exempt Detroit Edison under *Parker* v. *Brown:*

> The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a

> lamp-exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. *The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs.* We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program.

Cantor v. *Detroit Edison Co., supra,* 428 U. S. at 584-85 (emphasis added).

Later, however, as it began to illustrate the type of distinctions it had desired to make in *Goldfarb* and *Cantor,* the Supreme Court in *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 359-63 (1977), held exempt from the antitrust laws certain disciplinary rules promulgated by the Arizona State Supreme Court which prohibited attorneys from advertising in newspapers and other media. The defendants were licensed attorneys subject to complaints filed with the State Bar. Although they ultimately prevailed in the United States Supreme Court on their First Amendment challenge to the advertising ban, 433 U. S. at 363-84, the Court rejected their antitrust challenge to the enforcement of the advertising rules. It found that the rule-making by the State Supreme Court constituted "state action" because the state constitution gave that body the ultimate power to regulate the practice of law. 433 U. S. at 359-60.

Finally, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U. S. 97 (1980), the Supreme Court gathered together all of the preexisting decisions to articulate two requirements for antitrust immunity under *Parker* v. *Brown:* "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state

policy'; second, the policy must be 'actively supervised' by the State itself." 445 U. S. at 105.

In *Midcal Aluminum*, the court was faced with a California statute under which all wine producers, wholesalers and rectifiers were required to file fair trade contracts or price schedules with the state. If a wine producer had not yet set prices through such a fair trade contract, wholesalers nonetheless were required to post a resale price schedule for that producer's brand. Under the statutory scheme, no state-licensed wine merchant could sell wine to a retailer other than at the price set "either in an effective price schedule or in an effective fair trade contract. . . ." Holding that the plan in question violated the Sherman Act as illegally restraining trade through resale price maintenance, the Supreme Court found that the scheme was "essentially a private price-fixing arrangement", 445 U. S. at 106, not protected by the *Parker* v. *Brown* exemption. In so ruling, the Court held that the state did not "actively supervise" the resale pricing policy, and made pointed reference to the admonition of *Parker* v. *Brown* that " 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' 317 U. S., at 351." *Id.*

(C)

While *Midcal Aluminum* does in truth contain language which appears to be restrictive of the broader implications of *Parker* v. *Brown*, we conclude that a logical construction of all of the foregoing cases supports the conclusion of the district judge that both the enforcement by the Kentucky Board of Dentistry of the Kentucky statutory scheme of regulation of dentists, dental technicians, and dental laboratories and the actions of the defendant dentists come well within the exemption of *Parker* v. *Brown*.

We believe that the critical distinction between the facts here and those in *Cantor* and *Midcal Aluminum* is that here the conduct of the defendants emanates directly from the mandate of state law in a well-developed and long-established statutory scheme. It is not left to the private sector to decide what the policy is or whether it is to be complied with.[2] The two specific standards for antitrust immunity

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[2]The Supreme Court distinguished *Cantor* in *Bates* v. *State Bar of Arizona, supra,* on several grounds equally applicable here. First, the Court noted that *Cantor* did not deal with an antitrust claim against a public agency charged with enforcing state law:

> First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U. S. at 361 (footnote and citation omitted). This distinguishes *Cantor* from the plaintiffs' claim in this case against the Kentucky Board of Dentistry and its members. The Board of Dentistry is a public agency and its members are public officials. As we discuss later, the Kentucky legislature has by statute created the challenged restraint. Furthermore, as our description of the Kentucky statutory scheme has revealed, the Board of Dentistry "acts as the agent" of the state in enforcing the restraint, and the courts of Kentucky are "the ultimate trier[s] of fact and law in the enforcement process." Just as in *Bates,* then, "the appellants' claims are against the State."

Similarly, *Cantor* does not apply to plaintiffs' claim against the individual dentists. As *Bates* emphasized, *Cantor* involved a restraint of trade which was "instigated by [a private] utility with only the acquiescence of the state regulatory commission," 433 U. S. at 362, and in *Cantor* "the State had no independent

(Footnote continued on following page)

articulated in *Midcal Aluminum* are met. As we discuss below, the challenged restraint upon the dentists is clearly articulated in the extensive statutory scheme described above, and the policy is one which is actively supervised by the state.

The private conduct alleged to violate the antitrust laws here is the defendant dentists' refusal to hand the denture work order or prescription over to the patient so that the patient may shop around and employ the dental laboratory of his choice. Rather, the dentists send the prescriptions and orders for denture work directly to the laboratory of their choosing. Plaintiffs allege, and it appears undisputed, that the Board of Dentistry's enforcement of the Kentucky statute is based on its interpretation of the statute as prohibiting dentists from giving denture work orders directly to the patient, and that the defendant dentists have refused to give the work orders to the patients because they believe to do so would violate the Kentucky statute. Complaint at ¶¶4, 6.

The plaintiffs argue, at least inferentially, that antitrust exemption must be denied because the statute does not explicitly state that a dentist may not hand his work order over to the patient. We are unaware of any decisions by the courts of Kentucky which either accept or reject the Board of Dentistry's interpretation of the statute. In the absence of such judicial interpretation, we place great per-

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(Footnote continued from preceding page)

regulatory interest in the market" affected by the private restraint. *Id.* at 361. By contrast, the Kentucky legislature instigated the restraint challenged here, and Kentucky's regulatory interest in the production and proper fitting of dentures is longstanding and "at the core of the State's power to protect the public", *id.*, or, as the district court put it, "a matter which is of vital interest to the health and safety of [Kentucky's] citizens." District Court Op. at 4.

suasive weight on the interpretation of the statute by the administrative body charged with enforcing it. *Cf. Sound, Inc.* v. *A.T.&T.*, 631 F. 2d 1324, 1334 (8th Cir. 1980) (one of the factors to be considered under *Midcal Aluminum* is "the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator"); *Health Care Equalization Comm.* v. *Iowa Medical Soc'y*, 501 F. Supp. 970, 989, 991 (S.D. Iowa 1980). Indeed, we believe that the Board of Dentistry's interpretation of the statute is clearly correct. Accordingly, we hold that the dentists' challenged conduct is compelled by the statute itself and therefore exempt under the antitrust laws.[3]

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[3]Because we believe the meaning of the statute in this case is clear and unambiguous, we need not decide a more subtle question, namely whether the interpretation of an ambiguous or open-ended regulatory statute by a state agency can ever constitute "state-action" in and of itself under the *Parker* v. *Brown* doctrine. Certainly the first part of the *Midcal Aluminum* test, whether the challenged restraint is "clearly articulated and affirmatively expressed as state policy", at a minimum covers state policy explicitly declared in a statute. However, state regulatory statutes are often drafted in general terms and delegate broad policymaking discretion to a state regulatory agency. The result is administrative policymaking, either by authorized rulemaking or by enforcement practices. The Supreme Court has not decided whether and under what circumstances state policy which is first articulated and expressed by a state administrative agency satisfies the first part of the *Midcal Aluminum* test. We need not reach this question, since the specific policy at issue in this case is clearly expressed in the state statute itself. We note, however, that the Eighth Circuit has held that one of the factors to be considered under *Midcal Aluminum* is "the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator". *Sound, Inc.* v. *A.T.&T.*, *supra*, 631 F. 2d at 1334; *see Health Care Equalization Comm.* v. *Iowa Medical Soc'y*, *supra*, 501 F. Supp. at 989, 991.

The language of the statute strongly implies that the dentist and dental technician are to deal directly with each other, without any patient involvement. Ky. Rev. Stat. § 313.247 provides that "[n]o dentist shall use the services of any person not licensed to practice dentistry in this state to construct, alter, repair or duplicate any denture . . . without first *furnishing such unlicensed person* a written laboratory procedure work order on forms prescribed by the board." (emphasis added). Ky. Rev. Stat. § 313.010(2), in turn, makes it illegal for any dental technician to "advertise, offer, sell or deliver" any denture work "to any person other than a licensed dentist". We believe this language clearly articulates a state policy that dental technicians have contact with and sell to the dentist only and not to the public at large,[4] and that it is the dentist's responsibility to deliver his work orders to the dental technician he chooses.[5]

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[4]Plaintiffs' counsel received an opinion to this effect from the Kentucky Attorney General in 1977:

> [W]e are of the opinion that a dental laboratory may not advertise, offer, sell or deliver dental devices or the services rendered in the construction, reproduction, supply or repair thereof to any person other than a licensed dentist. Such action will constitute the practice of dentistry, KRS 313.010 (2).

Attorney General of Kentucky, Op. Att'y Gen. 77-226 (March 29, 1977).

[5]Supportive of this interpretation is an ethical opinion issued by the Kentucky Dental Association and published in its 1976 Journal:

> The dental laws of the state place definite limits on the performance of auxiliary personnel in the dental office . . .
> The laboratory technician plays an important role in the modern dental practice. It is important that the dentist protect the correct relationships as outlined in the Code of Ethics

(Footnote continued on following page)

As the district court found, the statutory provisions just described, by permitting dental technicians to deal only with licensed dentists, evidence a legislative policy placing the responsibility for the treatment and fitting of patients for dentures exclusively upon the licensed dentist, and thereby vests the dentist with the "right and, in fact, the duty to select whatever dental technician he believes to be qualified to fill the prescription for dentures." District Opinion at 6.[6]

There appears to be no dispute that the state of Kentucky "actively supervises" the statutory policy, thus meeting the second requirement of *Midcal Aluminum*. First,

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(Footnote continued from preceding page)

> The patient should never directly contact the technician without being in the presence of the dentist. A prime example of this is the prosthetic repair.
>
> The dentist should never send the patient to a laboratory for this work. It is up to the dentist to determine what is necessary to be done and delegate this work to the technician by prescription . . . .

[6]The plaintiffs point out that Kentucky gives statutory authority to dentists to give drug prescriptions directly to patients to be filled out by any druggist of their choice, Ky. Rev. Stat. 313.250(1); that Ky. Rev. Stat. § 320.300 permits optometrists to give prescriptions to the consumer to be filled out by any optical retailer; and that Ky. Rev. Stat. §§ 218A.010(16) and 218A.180 authorize the dispensing of controlled substances by physicians, dentists, podiatrists, veterinarians, or scientific investigators through prescription given to the consumer to be filled by the licensed pharmacist of his choice. Comparison of these statutory provisions to the denture prescription statute in no way affects our agreement with the Board of Dentistry's interpretation of the statute. Pharmacists and optical retailers are permitted to offer and sell drugs and prescription glasses directly to the public; dental technicians are expressly forbidden by statute to offer or sell dentures or related services "to any person other than a licensed dentist." Ky. Rev. Stat. §§ 313.010(2); 313.020.

the policy emanates directly from the language of a state statute and not from any agreements by private individuals as in *Midcal Aluminum*. Secondly, the powers of enforcement are expressly conferred upon the Board of dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of the action. *See, e.g., Renfro* v. *Kentucky Board of Dentistry,* No. 81-CA-1151-MR (Ky. Ct. App. Dec. 18, 1981).

IV

In addition to the defendant dentists' refusal to give denture work orders to their patients, plaintiffs' complaint contains other general antitrust allegations: a conspiracy by the defendants to monopolize the denture market in Kentucky and a conspiracy to boycott the plaintiff dental laboratories with the intent to drive them out of business. Defendants include individual members of the Kentucky Board of Dentistry, individual officers of the Kentucky Dental Association, and certain dentists who may or may not have connections to either one of those two groups. The complaint, however, fails to allege any facts from which a violation of the antitrust laws can be inferred on the part of any particular defendants. The only facts alleged are that the individual dentists were aproached by private cititzens and, upon being asked for work orders for dentures which might then be delivered to plaintiffs' laboratories or other laboratories of the patient's choice, refused. That is all. More than two years of discovery have revealed no more.

Our examination of the pleadings and the proofs in this action satisfies us that plaintiffs can show no more than a valid and extensive state regulatory scheme and obedience

by private persons to the mandates of the statutes. Although the plaintiffs do introduce proof concerning the efforts of the defendants to lobby in the state legislature against any proposed changes in the law and to encourage the Board of Dentistry to enforce the state law, this activity is as much entitled to First Amendment protection as are the efforts of the plaintiffs themselves to seek legislative changes in what they conceive to be an inappropriate statutory scheme which is harmful to them and to the consuming public. Such activity is not prohibited by the Sherman Act. *Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 135-39 (1961); *see California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510-11, (1972); *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669-70 (1965).

We are alert to the dangers of employing summary judgment procedures in complex litigation such as antitrust actions. The court's action here, however, was far from precipitate. Plaintiffs had the benefit of extensive pretrial discovery proceedings covering a period of more than two years. Full and ample notice had been given pursuant to Fed. R. Civ. P. 12, that defendants' motion to dismiss would be treated as a motion for summary judgment under Fed. R. Civ. P. 56. Nevertheless, the Plaintiffs have been wholly unable to articulate any case of private actionable conspiracy under the antitrust laws.[7]

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[7]We conclude that *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) is entirely dispositive of any suggestion in plaintiffs' brief that the alleged but indirect frustration of their right to free speech is somehow violative of the First Amendment. Plaintiffs do not claim that there has been an express campaign to infringe upon any First Amendment right to commercial free speech. The entire thrust of their argument is that the ban of the consumer's

(Footnote continued on following page)

V

As *California Liquor Dealers* v. *Midcal Aluminum, supra* has made clear, the *Parker* v. *Brown* exemption does not permit states to give a blank check to private individuals to engage in conspiracies in violation of the nation's antitrust laws. We do not doubt that in a proper case and upon proper pleadings and proof, dentists can be as guilty as anyone else of conduct which is unlawful under the Sherman Act. When such conduct does arise, the plaintiffs remain free to invoke the jurisdiction of the Federal courts under the antitrust laws. Because no antitrust case is made out here, the trial judge did not err in granting summary judgment.

AFFIRMED.

FEIKENS, District Judge, dissenting.

In this case the Court holds that the challenged restraint upon Kentucky dentists is clearly articulated in the statutory scheme and the policy is one which is actively supervised by the State. While the Court correctly reads *Cali-*

(Footnote continued from preceding page)

right to choose his own laboratory itself violates the First Amendment right because it thereby makes the plaintiffs' advertising commercially unrewarding. Brief of Appellants at 7. Because the statutory scheme is a valid exercise of Kentucky's police power, a finding of the district court not challenged in this appeal, there is no infringement of the right of commercial free speech under the First Amendment:

> As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. at 771. Advertising concerning transactions that are themselves illegal obviously may be suppressed. See *Pittsburg Press Co.* v. *Human Relations Comm'n*. 413 U. S. 376, 388 (1973).

Bates v. *State Bar of Arizona, supra*, 433 U. S. at 384.

fornia Retail Liquor Dealers to articulate two requirements for antitrust immunity under *Parker* v. *Brown:*

> "First, the challenged restrain must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U. S. at 105,

the court runs these two requirements together and concludes that if the policy is clearly articulated in a statute that establishes standards of conduct, then it is also actively supervised. I do not read *California Retail Liquor Dealers* in this way. It does not do justice to the cardinal point that the test includes two parts. Under that interpretation, and keeping some distinction between the parts, having fulfilled the first part by adopting a policy, the State must still fulfill the second part by producing standards of conduct. Yet whenever the State fulfills the second, it has also fulfilled the first. The first part is thus redundant. I believe the Supreme Court meant more: the state must not only clearly articulate its policy in legislation specifying standards of conduct, it must also actively supervise the policy by actively enforcing the legislation. Because the record in this case does not reflect that the State has enforced its policy, I cannot agree with the majority.

I would vacate the District Court's Order of Summary Judgment and remand the case for a hearing in which the State would have to show that it has seriously undertaken the enforcement of its anti-competitive statute. Absent a record, it can as easily be asserted that it is the Kentucky Dental Association and not the statutory Board of Dentistry which carries out this regulatory scheme. If that factual conclusion is made, we would have a situation here to which *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975) would apply. To quote *Goldfarb:*

> It is not enough that private anti-competitive conduct is 'prompted' by the state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign. 421 U. S. at 791.

As I read the development and the source of the state action doctrine, announced in *Parker* v. *Brown,* 317 U. S. 341 (1942), a state must not only show that it has adopted particular standards of conduct and that the legislation entrusts enforcement to a state agency, the state must also show that it has seriously undertaken the enforcement of the statute. Anything less and the fundamental federal policy of free competition "is being unnecessarily and inappropriately subordinated to state policy. . . ." *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 362 (1976).

The state action exemption, like many other doctrines in many areas of our jurisprudence, is the product of a close balancing of competing legitimate interests In this case, a balance between the federal policy of free competition and our fundamental principles of federalism which leaves to strong independent states the power to deal with peculiar local problems. As the Supreme Court stated in *Parker* v. *Brown, supra,* at 351, "In a dual system of government in which, under the constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." The Court speaks of the intention of Congress, but its finding is based on a presumption that results from the careful balance already described. *Bates* v. *State Bar of Arizona, supra,* at 362 (quoted above).

The balance presumes, of course, that a state does more than merely "authoriz[e], approv[e], encourag[e], or participat[e], in restrictive private conduct." *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579 (1975). The state "as

sovereign" must demonstrate the seriousness of its intentions by, first, clearly articulating and affirmatively expressing the restraint as state policy, and second, actively supervising the implementation of the policy. *California Liquor Dealers* v. *Midcal Aluminum*, 445 U. S. 97, 105 (1979). Active supervision of the policy in this context must include active enforcement. Without enforcement, the state is throwing into the balance a hollow husk.

The Supreme Court has repeatedly reiterated the necessity of enforcement. In *Parker*, at 352, the Court stressed in upholding the California program that "it is the state, acting through the Commission which adopts the program *and which enforces it with penal sanctions*, in the execution of a governmental policy." (Emphasis added). Similarly, in *Bates*, at 362, the Court concluded, "we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." And in *California Liquor Dealers*, at 100, fn 2, the Court in striking down California's wine pricing scheme noted that wine dealers who were covered by the regulation "also may be subject to private damage suits for unfair competition."

The wisdom of requiring a state to enforce its anticompetitive restraints is further evidenced when one considers the possible consequences of failing to enforce. A statute left unenforced by the state is an easy tool for protected groups to use illicitly in further securing hegemony over the market— most likely to the disadvantage of the consumers the legislation was meant to protect. The present case offers a possible illustration. While the prohibition on dealings between dental patients and dental technicians was undoubtedly intended to insure that denture wearers receive proper professional adjustment, it also gives dentists the opportunity to mark up the cost of a denture and to charge for an additional office visit. Dentists have an economic stake in the statute. Unenforced,

the private dental association is free to wield the statute discriminatively, perhaps only against those technicians who seek through lobbying or public advertising to change the statute. More elaborate and efficient legislation could thus be thwarted.

The private organization might also enforce the law only against technicians who advertise their services and prices even if they add that they are available only through the patient's dentist. This sort of advertising is presumably proper and competitive but it could be eliminated.* Unlike the scheme approved in *Bates* where the State Bar Association enforced the restraints under the close eye of the State Supreme Court, the role of the private Kentucky Dental Association is not "completely defined by the court" nor does it "act as the agent of the court under its continuous supervision." *Bates, supra,* at 361. If it leaves enforcement to the private professional organization, the State of Kentucky is doing no more than "casting a gauzy cloak of state involvement over what is essentially a private . . . arrangement." *California Liquor Dealers, supra,* at 106. As *Parker* established and the Court has repeated through the years, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.,* at 351.

A hearing would close the gap created by the Court. If the evidence shows that the State has seriously undertaken enforcement, then the *Parker* doctrine applies. If not, it does not.

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*An excellent recent article by Professors Payton and Powsner explores some of the ways in which professional medical organizations have pursued state regulation for the economic benefit of their members. See Payton and Powsner, *Regulation Through the Looking Glass: Hospitals, Blue Cross, and Certificate-of-Need,* 79 Mich. L. Rev. 203 (1980).

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 78-0184 L(A)

JAMES GAMBREL, et al., - - - - *Plaintiffs,*

v.

KENTUCKY DENTAL BOARD, et al., - - *Defendants.*

MEMORANDUM OPINION—Entered April 3, 1980

This action is submitted to the Court on the motion of the defendants to dismiss the complaint or, in the alternative, for summary judgment. The original complainant, James Gambrel, a licensed dental laboratory technician, and other plaintiffs, including consumers of dentures, requested the Court to declare K.R.S. 313.247 and the interpretations placed upon it by the Kentucky Dental Board and Kentucky courts unconstitutional.

Since matters outside of the pleadings have been considered the Court will treat the motion to dismiss as a motion for summary judgment.

The amended complaint added six new plaintiffs to the action and five new defendants and alleges, in substance, that plaintiff, who is licensed to make dentures and artificial teeth under the laws of Kentucky, has been damaged in the amount of $2,000,000 by violation of the Sherman Antitrust Act, 15 U.S.C. 1 et seq., in that defendants are dentists who have conspired to monopolize the dental market in Kentucky for themselves and fellow dentists, by refusing to allow plaintiffs to have prescriptions to fill

orders for patients' dentures. As in the original complaint, plaintiffs also request a permanent injunction and that a three-judge court be convened to declare the Kentucky statutes unconstitutional.

The proof in the case reflects that the plaintiffs' basic factual complaints are that it is the practice of some dentists to refuse to give their customers the right to select their own dental laboratory to fill the prescriptions of their dentists with regard to the supplying of dentures. K.R.S. Chapter 313, and more specifically K.R.S. 313.010, defines what persons are to be regarded as dentists, dental hygienists and dental laboratory technicians.

We assume, for the purposes of the motion, that plaintiff Gambrel does, in fact, charge lower prices for the construction of dentures than do some of his competitors, and that persons who have been treated by dentists and who have told the dentists that they wish to have their dentures done by plaintiff have been denied the right to take their prescriptions given them by their dentists to plaintiff and have had to have their dentures altered, repaired or fabricated at a dental laboratory selected by the dentists.

The attacks upon the constitutionality of these statutes is without substance. Many courts have considered challenges to dental statutes similar to K.R.S. Chapter 313. All of the decisions with which this Court is familiar have held that a state may reasonable regulate the practice of dentistry. *State* v. *Chapman,* 70 N.J.L. 339, 57 A. 1133 (Sup. Ct. 1904); *Levine* v. *State Board of Registration and Exam. in Dentistry,* 121 N.J.L. 193, 1 A. 2d 876 (Sup. Ct. 1938); *Kunkle* v. *Comm. of Pennsylvania, State Dental Council and Exam. Bd.,* 392 A. 2d 357 (Comm. Ct. Pa. 1978); *Cryan* v. *Oklahoma,* 583 P. 2d 1122 (Cr. App. Okla. 1978); *Addiego* v. *New Jersey,* 394 A. 2d 179 (Sup Ct. N.J. 1978). In fairness to plaintiffs, it should be noted *Kunkle,*

Cryan and *Addiego* are not decisions of the highest courts of their states.

K.R.S. 313.247(1) requires that no dentist shall use the services of any non-dentist to perform any dental laboratory work without first furnishing such unlicensed person a written prescription or work authorization.

K.R.S. 313.247(3) allows the licensed dentist to have a technician work exclusively within his office to do laboratory work without a prescription.

More significantly, in *Schiller* v. *The Illinois State Dental Society,* Civil Action 78 C 3936 (N.D. Ill. E.D. April 6, 1979), District Judge Crowley held that the Illinois Dental Practice Act which contains provisions very similar to those in the case at bar did not violate any constitutional rights of the denturists under the First, Fifth, Thirteenth and Fourteenth Amendments.

The Supreme Court, in the case of *Williamson* v. *Lee Optical Company,* 348 U. S. 483 (1955) held that an Oklahoma statute which made it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist was valid. See page 485.

The court stated that while the Oklahoma law might result in needless expense to the consumer it was enough that the legislature thought that there was a number of occasions when a written prescription was necessary to justify this legislation in the fitting of eye glasses. The court held that it was sufficient that there was an "evil" at hand for correction, and that the particular legislative measure was a rational way to correct it.

By the same token, it is apparent that Kentucky law rationally requires a dentist to be responsible, not only for the treatment of his patient, but also for the fitting of

appliances to that patient's mouth and for the proper construction of dentures. Having rationally determined that this responsibility lies with the dentist, it was also rational for the legislature to mandate that no repair or fitting of dental structures be completed except upon the prescription of the dentist, and constructed upon or by the use of casts or molds made by the impression taken by a licensed dentist.

Plaintiffs are unable to point to a single case upholding their contentions about the constitutionality of K.R.S. Chapter 347, which plainly relates to the police power of the State to protect the health and welfare of its citizens.

Next we reach the question of whether plaintiffs may validly assert antitrust claims against dentists and dental board who approve the practice of dentists in issuing prescriptions for their patients only to those dental laboratories which they select, rather than a dental laboratory which the patient would prefer. The *Schiller* v. *The Illinois State Dental Society, supra,* plainly holds with regard to similar claims made by dentists in Illinois that such claims are not cognizable under the Sherman Antitrust Act. As Judge Crowley stated in his opinion "the Supreme Court held that the Sherman Act did not apply to a state's anti-competitive regulation when the state imposed such regulations 'as an act of government'." (Citing *Parker* v. *Brown,* 317 U. S. 341, 352 (1943). See page 8 of Judge Crowley's opinion. Judge Crowley, in his opinion, also called attention to the case of *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977) which holds that an anti-trust claim by Arizona attorneys was barred since the Arizona attorney's disciplinary rule fell within the *Parker* v. *Brown, supra,* exemption.

In *Bates* v. *State Bar of Arizona,* the Supreme Court stated in order to determine whether the *Parker* v. *Brown, supra,* exemption is applicable, the court must determine "1) whether the regulation is truly the action of

the State; 2) whether the plaintiff's claims are ultimately directed at the State; and 3) whether the regulation furthers some policy by the State in order to avoid unnecessary and inappropriate subordination of the federal policy underlying the antitrust laws."

Here, the State of Kentucky has given full authority to dentists to choose dental work laboratories of their own choice. This authority is fully conferred in K.R.S. 313.-010(1) and 313.247(1). K.R.S. Chapter 313 is a direct and affirmative command by Kentucky concerning a matter which is of vital interest to the health and safety of its citizens.

However, the plaintiffs here contend that defendants are using the statutes to practice monopoly for their own private benefit and that, therefore, the *Parker* v. *Brown, supra,* exemption should not be utilized. The problem with that argument is that in every instance complained of by the defendants concerning boycotts, conspiracy, illegal price fixing, and refusal to give prescriptions to plaintiffs to shop at the laboratory of their choice, such actions are authorized by K.R.S. Chapter 313. In Kentucky, as in Illinois, the Kentucky Legislature depends on public officials and on dentists acting as private citizens to aid in the enforcement of K.R.S. Chapter 313. Therefore, plaintiff's claims are ultimately directed at the State of Kentucky, and any relief they seek must be given them by the Legislature of Kentucky.

We have examined cases relied upon by the plaintiffs such as *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975); *Kathleen R. Reiter* v. *Sonotone Corporation,* No. 78-690, 47 U. S. L.W. 4672 (decided June 11, 1979); *Bates* v. *State Bar or Arizona, supra.*

Goldfarb v. *Virginia State Bar, supra,* involved the setting of fee schedules for title work by attorneys in Virginia. The Supreme Court held that where every lawyer

adhered to the fee schedule published by the Fairfax County Bar Association, these activities created a price fixing system. The court also held that the *Parker* v. *Brown, supra,* state action exemption was not available to the attorneys, since it could not be said that the State of Virginia required the anti-competitive activities of the attorneys. In *Goldfarb* the court did recognize that "in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States* v. *Oregon State Medical Society,* 343 U. S. 326, 336 (1952). See also *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, 611-613(1935)." See page 792.

In *Reiter* v. *Sonotone Corporation, supra,* the court held that consumers who purchase hearing aids have standing to bring an antitrust action aganst five hearing aid distributors who allegedly have conspired to fix prices of hearing aids.

In *Bates* v. *State Bar of Arizona, supra,* the Supreme Court held that it was a violation of the First Amendment rights of lawyers to prevent them from advertising their professional services in the media. None of these cases are applicable to the case at bar.

Here, the consumers select their own dentist in the first instance; then that dentist proceeds to order dentures from a dental technician in whom he has trust. The statute contemplates that he shall have the absolute right and, in fact, the duty to select whatever dental technician he believes to be qualified to fill the prescription for dentures. The state statutes, K.R.S. 313.010 and 313.247(1), in effect, constitute the dentist as the consumer of the dental appliances furnished by the dental technician.

Finally, it seems to the Court that the remedy of the consumers here is legislative. Their wish is to be able to have dentures furnished them by the lowest price dental

technician regardless of their dentist's preference. It is quite conceivable that the legislature could prepare legislation which would mandate that the dentist would merely furnish the prescription and that then the patient would be able to secure his prescription at the dental laboratory of his choice. However, in the absence of such legislation, this Court sees no alternative but to dismiss the complaint and amended complaint filed by the plaintiffs.

A judgment in accordance with this opinion will be entered this day.

(s) Charles M. Allen

Dated 4/3/80 Chief Judge

cc: Counsel of Record

No. 79-1529

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued October 31, 1979

HELEN SCHILLER, et al., - - *Plaintiffs-Appellants,*

v.

ILLINOIS STATE DENTAL SOCIETY, et al., - - - - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 78 C 3936 John Powers Crowley, Judge

ORDER—Entered December 3, 1980

BEFORE: HON. THOMAS E. FAIRCHILD, Chief Judge; HON. LUTHER M. SWYGERT, Circuit Judge; HON. ROBERT A. GRANT, Senior District Judge.*

At issue is the constitutionality of the Illinois Dental Practice Act, Ill. Rev. Stat. ch. 111, §§ 2202 *et seq.* The district court dismissed the class action complaint for lack of a substantial federal question. Because we conclude that a substantial federal claim has been stated, we reverse and remand for further proceedings.

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*Sitting by designation.

I

At the outset we note that the jurisdictional basis for this action has been imprecisely stated in the complaint. Section 1983 jurisdiction is alleged but no "state action" is specified and no state official is a party defendant. The complaint does allege, however, that the defendants Illinois Dental Society, its officers, and Julius W. Ulaneck are "prosecuting actions" against plaintiff denturists. Section 2244 of the Illinois Dental Practice Act, Ill. Rev. Stat. ch. 111, § 2244 ("the Act"), provides:

> The Attorney General for the State of Illinois, the State's Attorney for any county in the State, *or any resident citizen* may maintain an action in the name of the people of the State of Illinois to perpetually enjoin any person from so unlawfully practicing dentistry and from doing, committing or continuing of such unlawful act.

(emphasis added.)

We infer that plaintiffs are asserting jurisdiction under section 1343, 28 U.S.C. § 1343, on the basis that the defendants by enforcing the Act under section 2244 are acting under color of state law.

In addition, a basis for jurisdiction under section 1331, 28 U.S.C. § 1331, though seemingly present in light of plaintiffs' allegation that they have suffered more than $1,000,000 in damages, is not set out in the complaint. On remand, plaintiffs must amend their complaint to state more clearly the jurisdictional bases for this action.

II

Plaintiffs contend that the Illinois Dental Practice Act is unconstitutional as violative of both equal protection and

due process. According to section 2218 of the Act, denturists may construct and repair dentures, bridges, or replacements "exclusively; directly and solely for licensed members of the dental profession, and not for the public or any part thereof." In addition, denturists may not advertise to the public "in any manner" the appliances constructed and repaired or the services rendered but may advertise only in dental trade journals and professional publications. Ill. Rev. Stat. ch. 111, § 2218. Violations of the Act are Class A misdemeanors. Ill. Rev. Stat. ch. 111, § 2242.

Plaintiffs argue that permitting dentists but not denturists to provide denture care and advertise directly to the public is a violation of equal protection. Our first task is to determine the proper standard of review. The right to practice the profession for which one is trained, plaintiffs argue, is a fundamental right, making strict judicial scrutiny the appropriate standard. We do not agree. In *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976), the Supreme Court held that there was no fundamental right to government employment. Although our case involves private rather than public employment, we agree with the trial judge that *Murgia* forecloses our deciding that plaintiffs have a fundamental right to practice denturism. Therefore we must apply the traditional rational basis test rather than strict scrutiny in examining the challenged statute.

Plaintiffs also allege that the statutes violates due process. Because we hold that the denturists have not been denied a fundamental right, the due process challenge must be decided on the basis of whether there is a rational relationship between the prohibitions in the statute and the legitimate state interests, if any, the statute was enacted to serve. Although the due process and equal protection issues are conceptually different, for practical purposes they

are here indistinguishable. If the statute is rational, it must be upheld.

The express purposes of the Act are to protect the public health, safety and welfare and to further public trust in the dental profession. Ill. Rev. Stat. ch. 111, § 2202. Those state interests are unquestionably legitimate and if they are furthered by the statute, then it is constitutional even if the classifications contained therein are imperfect. *Dandridge* v. *Williams*, 397 U. S. 471 (1970), and even if the law is not "in every respect logically consistent with its aims. . . ." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487 (1954).

The problem we face is that there is simply no basis in the record for deciding whether there is a rational relation between the statutory prohibitions and objectives. Because the case was dismissed on the basis of the pleadings, we are presented with no facts on which to judge the issues or apply the law. Plaintiffs allege that by prohibiting denturists from providing denture care directly to the public, the Act results in no or inadequate denture care for a large segment of our elderly and edentulous population. Simply stated, plaintiffs assert that the public health, safety and welfare is only harmed by this statute. If that is true, the statute is not rationally related to its goal. We believe that some evidentiary inquiry is necessary to decide that issue fairly. In addition, it is not clear from the pleadings that the statute's other stated purpose—to further respect for the dental profession—is rationally related to prohibiting denturists from practicing denturism. The State's requirements for the licensing of dentists are not challenged; nor do plaintiffs claim that denturists are qualified to practice dentistry. In a similar fact situation, the Fifth Circuit held that plaintiff chiropractors, who challeneged the constitutionality of prohibiting the practice of chiropractic in Louisiana, could not be denied the opportunity to demon-

strate that outlawing the practice of chiropractic had no rational basis:

> As we understand, the plaintiffs can claim no right to practice medicine as that practice is engaged in by medical doctors and surgeons. The question is whether they can be constitutionally excluded from the practice of chiropractic. . . .

England v. *Louisiana State Board of Medical Exam.*, 263 F. 2d 661, 665 (5th Cir. 1959). As here, that case had been dismissed by the district judge on the basis of the pleadings for lack of a substantial federal question. The Fifth Circuit, while acknowledging that the plaintiffs' burden was great, reversed and remanded for a determination on the basis of an evidentiary inquiry.

In *Gault* v. *Garrison*, 569 F. 2d 993 (7th Cir. 1977), this court faced an action by a public school teacher who alleged that mandatory retirement at age 65 violated her equal protection and due process rights. We noted that in light of *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976), our inquiry was limited to ascertaining whether the requirement was rationally related to a legitimate state interest. But although we recognized that the requirement had to be assessed according to the relaxed rational basis standard, we reversed the district court's dismissal on the basis of the pleadings:

> It is no answer to say that a state "does not violate the Equal Protection Clause merely because the classification made by its law are imperfect," when these classifications cannot be shown even to be rationally related to the objective the state is attempting to achieve. . . .

569 F. 2d at 996 (citation omitted).

The decision in *Murgia*, we noted, was based on an evidentiary record showing how the challenged legislation related to a legitimate state purpose. In the absence of any such factual showing, this court refused in *Gault* to uphold the constitutionality of the state's action.

We hold that some evidentiary inquiry is required to decide whether the challenged sections of this statute have a rational basis.[1] In each of the cases relied on by the district court, the decision that the state action was constitutional was based not on the pleadings but on an evidentiary record. *Vance* v. *Bradley*, 440 U. S. 93 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976); *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955); *Trafelet* v. *Thompson*, 594 F. 2d 623 (7th Cir. 1979).[2]

Circuit Rule 18 shall apply on remand.

REVERSED and REMANDED

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[1]Although the plaintiffs' burden is admittedly great, we do not agree with appellees that this is a case where the rationality issue can be resolved on the basis of judicial notice.

[2]Although the constitutionality of this statute has been challenged in previous litigation, *see, e.g.*, *Duncan* v. *Ward*, 225 F. Supp. 195 (N.D. Ill. 1963), those adjudications are not binding on this court. In *People* v. *AAA Dental Laboratories*, 8 Ill. 2d 330, 134 N. E. 2d 285 (1956), the Illinois Supreme Court upheld the statute as constitutional, reversing in part and affirming in part a decision by the Illinois trial court that it was unconstitutional to prohibit dental technicians from selling dentures directly to the public but constitutional to permit only licensed dentists to take the necessary impressions, give the order or prescription and fit the dentures in the patient's mouth. We would be bound on this question only by a decision of the Supreme Court of the United States. However, on appeal to the United States Supreme Court, the case was dismissed "for want of a substantial federal question." 352 U. S. 863. Similarly, in *Cordak* v. *Reuben H. Donnelly*

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Corp., 20 Ill. 2d 153, 169 N. E. 2d 321 (1960), the constitutionality of a certain advertising restriction in the statute was upheld by the Illinois Supreme Court. The United States Supreme Court also dismissed that appeal for want of a substantial federal question. 365 U. S. 299 (1961).

Those summary adjudications by the United States Supreme Court are decisions on the merits and if the issues there decided are the same as those raised here, they are controlling precedent. *Hicks* v. *Miranda*, 422 U. S. 332, 345 (1975); *Chicago Sheraton Corp.* v. *Zaban*, 593 F. 2d 808 (7th Cir. 1979). Summary adjudications by the Supreme Court, however, have less precedential value than an opinion on the merits and "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 182 (1979), quoting *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). The rationale of a summary adjudication may not be gleaned from the opinion below. *Mandel* v. *Bradley*, 432 U. S. at 176.

We have examined the jurisdictional statements and pleadings submitted on appeal to the Supreme Court in those cases, and we conclude that the issues on which the Court based its dismissals are not dispositive of the instant case. In *AAA Dental Laboratories, Inc.* v. *Illinois ex rel. Chicago Dental Society*, 352 U. S. 863 (1956), the due process issue was whether the statute was rationally related to its purpose where the right of a dental technician to practice his occupation depended solely on whether he was employed by a dentist, without there being any statutory qualifications for technicians or requirement that a dentist supervise their work. The equal protection issue also concerned the lack of statutory qualifications for dental technicians, allegedly resulting in arbitrary decisions by dentists as to which technicians would be employed.

The due process and equal protection issues before the Court in *Cordak* v. *Reuben H. Donnelly Corp.*, 365 U. S. 299 (1961), involved the Act's restriction of advertising by dental technicians in business and telephone directories to name, address, and telephone number listings. Not disputing the legitimacy of preventing

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technicians from advertising to the public, appellants argued that the law was irrational because it prevented technicians from advertising important information to dentists as well.

In the instant case the issue is whether due process and equal protection are violated because denturists are prevented from providing denture care and advertising directly to the public. That issue is different from those before the United States Supreme Court in the *AAA Dental Laboratories* and *Cordak* cases and therefore those decisions are not controlling.